BEFORE THE
INDIANA ELECTION COMMISSION

IN THE MATTER OF MICRO VOTE	)	ADMINISTRATIVE CAUSE
	)	
GENERAL CORPORATION	)	NUMBER 2007-01

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

The issue in this proceeding is whether the Indiana Election Commission ("Commission"), as requested by the Indiana Election Division ("Division"), has the authority to revoke its approval of MicroVote General Corporation's electronic voting system based on the same conduct at issue in a prior action brought by the Office of the Secretary of State and, if so, did the Commission waive its right to do so, or is this action otherwise barred, by failing to join in a previously filed and adjudicated action related to MicroVote's conduct.

Because the Commission has been granted independent oversight authority by the legislature, the Commission is the only governmental body which may revoke its approval of electronic voting systems under Indiana Code 3-11-7.5-28; and because the Division is charged with assisting the Secretary of State *and* the Commission pursuant to Indiana Code section 3-6-4.2-2, this action is not barred. Moreover, because the Division brought this action for a penalty against MicroVote based on virtually the same conduct that the Secretary of State previously determined existed, and then punished, in *In re MicroVote General Corp.*, Admin. Cause No. 06-0003-ED, and because the issues in that litigation are established against MicroVote, summary judgment in favor of the Division is proper.

FACTUAL AND PROCEDURAL BACKGROUND

1. This complaint was filed by the Petitioner, the Indiana Election Division, on or about March 23, 2007. It alleged four areas of violation of Indiana Code section 3-11-7.5-28 based on activities occurring between October 1, 2005 and April 28, 2006—the period in which MicroVote's electronic voting system was not certified by the Indiana Election Commission (the "Uncertified Period"): (1) the illegal sale of an uncertified voting system, (2) the illegal marketing of an uncertified voting system, (3) the illegal installation of an uncertified voting system, and (4) permitting the use of an uncertified voting system. The Division seeks to have the maximum penalty imposed pursuant to Indiana Code section 3-11-7.5-28, which allows the Commission to revoke the approval required for electronic voting systems, and prohibit MicroVote from "marketing leasing, or selling any voting system in Indiana for a specified period not to exceed five (5) years."[1]

2. In its Answer, MicroVote referred to the majority of the Division's allegations as "legal conclusions" requiring no answer from MicroVote. However, MicroVote did admit in response to various allegations that "it marketed, sold, installed and/or permitted the use of the then current version(s) of its electronic voting system in various Indiana Counties" at various times. *See* Answer, ¶¶ 1.4, 1.6, 3.3. MicroVote also admitted it delivered "equipment, software, and other materials" during the Uncertified Period. *See* Answer, ¶ 1.15. It also admitted contact or communications with other Indiana counties during the Uncertified Period. *See* Answer, ¶¶ 2.3, 3.3, 4.3. Finally, MicroVote admits it upgraded software during the Uncertified Period. *See* Answer, ¶ 3.2.

[1] In its Motion for Summary Judgment, counsel for the Division also requested MicroVote be referred to "the appropriate prosecuting attorney" for violating Ind. Code § 3-14-3-8. This relief is not requested in the complaint, and thus is not considered here.

3. Prior to the filing of this action, the Secretary of State filed an action against MicroVote, seeking a civil penalty for violation of Indiana's election laws. (The "Civil Penalty Action"). That action resulted in a civil penalty being assessed against MicroVote for "at least fifty-seven" violations of Indiana election law, including facts constituting violations of Indiana Code 3-11-7.5-28. Civil Penalty Order at ¶ 6.1-5. This action was filed by the Division before the Order in the Civil Penalty Action was issued on May 21, 2007.

4. On February 4, 2008, MicroVote filed a Motion for Summary Judgment asserting that the doctrines of *res judicata* operated to bar this action. MicroVote asserted, *inter alia*, that the Division and the Commission's failure to litigate the approval issue in the Civil Penalty Action brought by the Office of the Secretary of State barred it from re-litigating it here.

5. On February 5, 2008, the Division filed its Motion for Summary Judgment asserting that, essentially, the facts were uncontroverted that MicroVote violated Indiana Code section 3-11-7.5-28. The Division, as well as MicroVote, relies on various portions of the record in the Civil Penalty Action in support of their respective arguments.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

I. FINDINGS OF FACT.

In the Civil Penalty Action, *In re MicroVote*, No. 06-0003-ED, the following facts were found established, and are incorporated herein:[2]

[2] These facts were established in the prior action and are taken verbatim from that order with internal evidentiary references included. The Division submitted many, if not all, of the sources of these facts for this matter. Likewise, MicroVote incorporated the record to the Civil Penalty Action in its response to the Division's Motion for Summary Judgment. Accordingly, while these facts are established as a matter of law for the reasons set forth herein, they are also "found" by the same means as the ALJ in the Civil Penalty Action. In accordance with Indiana Code section 4-21.5-3-27, and because these facts

1. MicroVote General Corporation (hereinafter "MicroVote") sells election equipment and has sold its electronic voting system to forty-seven (47) Indiana counties. (Civil Penalty finding ¶ E.1).

2. On October 1, 2005, MicroVote's electronic voting systems software was decertified by operation of statute, specifically, IC § 3-11-7.5-28. After this decertification, MicroVote had no voting equipment certified for use in Indiana until April 28, 2006. (*See* Finding of Fact ¶ E.28. (Civil Penalty finding ¶ E.3).

3. As the statutory expiration date of October 1, 2005 approached, MicroVote contacted the Indiana Election Commission seeking clarification regarding IC § 3-11-7.5-28(g). (Civil Penalty finding ¶ E.4).

4. MicroVote received an interpretation of IC § 3-11-7.5-28(g) which was made by Dale Simmons, Co-General Counsel for the Indiana Election Commission. MicroVote asserts that it relied on this interpretation, despite a disclaimer that was placed on the bottom of the correspondence from Mr. Simmons to MicroVote that explicitly warned that a party should not rely upon the legal interpretation of any member or staff person of the Indiana Election Commission but, instead, should seek guidance from the party's legal counsel if a party is unsure of the meaning or application of any statute found in the Indiana Election Code. (Civil Penalty finding ¶ E.5).

5. After October 1, 2005, MicroVote asserts that it was delayed in applying for and obtaining State approval/renewal regarding its electronic voting system due to several factors, some beyond its control. (Civil Penalty finding ¶ E.6).

6. Specifically, MicroVote was delayed in applying for and obtaining State approval/renewal regarding its electronic voting system after October 1, 2005, at least in part because national authorities (specifically the national NASED Technical Review Committee) placed a moratorium on (re)certification testing of such systems due to problems arising from other vendors in California, which moratorium was lifted and (re)certification testing allowed to resume only after NASED, EAC and ITA met on March 30, 2006, in Washington, D.C. (Civil Penalty finding ¶ E.6).

7. On October 11, 2005, the Commissioners of Shelby County signed a contract with MicroVote to purchase thirty-six (36) Infinity voting panels at a total price of one hundred thirteen thousand nine hundred forty dollars ($113,940.00). *See* Exhibits 1 & 2. A final pricing Estimate confirming the contractual amount was provided to Shelby County on November 14, 2005. *See* Exhibit 2. These thirty-six (36) panels were then ordered on November 16, 2005, invoiced on March 13, 2006,

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are deemed established by the Civil Penalty Action, they include citations to the record in that action, and also citations to the applicable paragraphs in the final order. Finally, it should be noted that the conclusions of law decided in the prior action and applicable here, *i.e.* that MicroVote marketed, sold, installed and permitted the use of an uncertified voting system, are also established for reasons set forth in Part IV.

and delivered by MicroVote to Shelby County on March 20, 2006. *See* Exhibits 3, 4 and 5. A separate order for forty (40) panels was invoiced on October 31, 2005. *See* Exhibit 6. (Civil Penalty finding ¶ E.7).

8. On October 18, 2005, the Commissioners of Fayette County signed a contract provided by MicroVote at a total price of fifty-four thousand forty-three dollars ($54,043.00), which included the purchase of at least twenty-two (22) Infinity units. *See* Exhibit 7. James Ries, President of Micro Vote, provided a signed and notarized Affidavit on November 4, 2005, to Fayette County stating that the equipment being purchased from MicroVote was in compliance with all requirements of Indiana and federal law. *See* Exhibit 8. However, Fayette County's need exceeded that which was originally contracted for and a final pricing Estimate, in the amount of two hundred fifteen thousand one hundred fifty eight dollars ($215,158.00), was sent to Fayette County on November 14, 2005. *See* Exhibit 9. An invoice, in the amount of two hundred fifteen thousand one hundred fifty eight dollars ($215,158.00), for fifty (50) Infinity panels and twenty-two (22) systems was provided by MicroVote on March 13, 2006. *See* Exhibits 10 and 11. (Civil Penalty finding ¶ E.8).

9. On November 10, 2005 the Commissioners of Pulaski County signed a contract provided by MicroVote to purchase six (6) Infinity voting machines at a total price of seventeen thousand two hundred fifty dollars ($17,250.00). *See* Exhibit 12. An Estimate on pricing had been sent by MicroVote on October 27, 2005, as well as a Cost Projection analysis. *See* Exhibits 13 and 14. The Order for this equipment was place by MicroVote on November 23, 2005 and Invoiced to the county on March 21, 2006. *See* Exhibits 15, 16, and 17. (Civil Penalty finding ¶ E.9).

10. On December 6, 2005, the Commissioners of Grant County signed a contract with MicroVote for a total price of fourteen thousand three hundred sixty dollars ($14,360.00), which included the purchase of four (4) Infinity voting panels. *See* Exhibit 18. The cost projection and Estimate for this purchase were provided by MicroVote on November 23, 2005. *See* Exhibits 19 and 20. The equipment was then invoiced by MicroVote on February 28, 2006. *See* Exhibit 21. (Civil Penalty finding ¶ E.10).

11. Hamilton County received a Cost Projection from MicroVote for the purchase of fifteen (15) Infinity units on November 16, 2005, and an Estimate on November 28, 2005. *See* Exhibits 22 and 23. A contract was then signed by MicroVote on November 28, 2005, and sent to Hamilton County for a total price of ninety-three thousand two hundred thirty one dollars and eighty cents ($93,231.80), which included the purchase of fifteen (15) Infinity panels. *See* Exhibit 24. The fifteen units were invoiced by MicroVote on March 21, 2006. *See* Exhibit 25. This was in addition to the one hundred sixty-seven (167) Infinity panels that were invoiced by MicroVote on November 2, 2005, and delivered to Hamilton County on November 3, 2005. *See* Exhibit 26. (Civil Penalty finding ¶ E.11).

12. On February 7, 2006 the Commissioners of Marshall County signed a contract provided by MicroVote for a total price of twelve thousand six hundred sixty dollars ($12,660.00) which included the purchase of four (4) Infinity units. *See* Exhibit 27. These units were priced by MicroVote in a Cost Projection for Marshall County on January 16, 2006 and Invoiced March 10, 2006. *See* Exhibits 28 and 29. (Civil Penalty finding ¶ E.13).

13. Brown County was provided with a Cost Projection prepared by MicroVote for the purchase of ten (10) Infinity units on January 23, 2006. *See* Exhibit 30. A contract for the purchase of this equipment from MicroVote in the amount of fifty-one thousand one hundred ninety five dollars ($51,195.00) was then provided to Brown County by MicroVote and the County commissioners signed it on February 21, 2006. *See* Exhibit 31. Brown County was given oral affirmation that the equipment being sold to them was certified and that only certified equipment would be delivered to them. *See* Exhibit 32, Deposition Transcript of Benita Fox, Brown County Clerk, p. 7. Twenty-three (23) total Infinities were ordered from MicroVote for the county; the first ten machines were invoiced on March 30, 2006 and April 3, 2006, and the final thirteen were invoiced on May 9, 2005. *See* Exhibits 33 and 34. (Civil Penalty finding ¶ E.13).

14. Knox County was provided with a Cost Projection from MicroVote for the purchase of three (3) Infinity units on February 7, 2006. *See* Exhibit 35. A contract provided by MicroVote was then signed by the Commissioners of Knox County on March 6, 2006, for the purchase of these units at a total price of nine thousand five hundred ninety seven dollars ($9,597.00). *See* Exhibit 36. The equipment was invoiced by MicroVote on March 27, 2006. *See* Exhibit 37. (Civil Penalty finding ¶ E.14).

15. DeKalb County was provided with a Cost Projection from MicroVote for the purchase of three (3) Infinity units on February 9, 2006. *See* Exhibit 38. A contract was then provided by MicroVote and signed by the Commissioners of DeKalb County on February 13, 2006, for the purchase of these units at a total price of nine thousand nine hundred dollars ($9,900). *See* Exhibit 39. The equipment was invoiced by MicroVote on March 23, 2006. *See* Exhibit 40. (Civil Penalty finding ¶ E.15).

16. Bartholomew County was provided with a Cost Projection from MicroVote for the purchase of thirteen (13) Infinity units on February 24, 2006. *See* Exhibit 41. A contract provided by MicroVote was then signed by the Commissioners of Bartholomew County on March 6, 2006. *See* Exhibit 42. (Civil Penalty finding ¶ E.16).

17. The Infinity panels that were marketed, sold, leased, installed, and/or implemented during the above time frame were equipped with the versions of software and firmware that was automatically decertified after October 1, 2005. *See* Exhibit 43, Deposition of James Ries, page 28, lines 21-25; page 29, line 1; page 38, lines 16-23. All invoiced equipment would have been delivered prior to or within approximately one week of invoice date per company policy. *See*

Exhibit 43, Deposition of James Ries, page 27, lines 3-7. The new firmware version 3.07 was installed in all forty-seven counties sometime between March 1, 2006 and April 18, 2006. *See* Exhibit 43, Deposition of James Ries, page 10, lines 1319. (Civil Penalty finding ¶ E.17).

18. Indiana law requires that public tests be conducted on voting systems which are to be used in an Indiana election no later than fourteen (14) days before any election. These tests are conducted to test the operating accuracy of the electronic voting system. *See* generally, IC 3-11-14.5-1 *et seq.* (Civil Penalty finding ¶ E.18).

19. Public tests of MicroVote voting equipment occurred in all 47 counties in which it does business sometime between March 22, 2006 and April 18, 2006, as statutorily mandated by IC 3-11-14.5 *et seq.* (Civil Penalty finding ¶ E.19).

20. The public tests of the Infinity panels in Hendricks County and Kosciusko County were performed on March 22, 2006. *See* Exhibits 44 and 45. The public test of the Infinity panels in Clinton County was performed on March 28, 2006. *See* Exhibit 46. The public tests of the Infinity panels in Greene County and Owen County were performed on March 29, 2006. *See* Exhibits 47 and 48. The public tests of the Infinity panels in Dubois County, Orange County and Warrick County were performed on April 4, 2006. *See* Exhibits 49, 50 and 51. The public tests of the Infinity panels in Daviess County, Knox County and Perry County were performed on April 5, 2006. *See* Exhibits 52, 53 and 54. (Civil Penalty finding ¶ E.20).

21. A Notice of Violation was issued by the Office of the Secretary of State on April 7, 2006. This Notice set a hearing on the matter for April 17, 2006, and was given Cause No. 060001-ED (hereinafter referred to as Cause - 06-0001). *See* Exhibit 55, Notice of Violation. (Civil Penalty finding ¶ E.21).

22. The public test of the Infinity panels in Pulaski County was performed on April 7, 2006. *See* Exhibit 56. The public tests of the Infinity panels in Starke County were performed on April 8, 2006. *See* Exhibit 57. The public tests of the Infinity panels in Blackford County, Decatur County, and Fayette County were performed on April 10, 2006. *See* Exhibits 58, 59, and 60. The public tests of the Infinity panels in Brown County, Clay County, Marshall County, Noble County, Pike County, Putnam County, and Spencer County were performed on April 11, 2006. *See* Exhibits 61-67. The public tests of the Infinity panels in Grant County, Huntington County, Miami County, Tipton County, and Wells County were performed on April 12, 2006. *See* Exhibits 68-72. The public tests of the Infinity panels in Rush County and Shelby County were performed on April 13, 2006. *See* Exhibits 73 and 74. The public tests of the Infinity panels in Hamilton County, Lake County, and Sullivan County were performed on April 17, 2006. *See* Exhibits 75, 76, and 77. The public test of the Infinity panels in Adams County was performed on April 18, 2006. *See* Exhibit 79. (Civil Penalty finding ¶ E.22).

23. A Hearing took place in Cause No. 0001 before the Secretary of State on April 17, 2006. Evidence was taken at this hearing. *See* Exhibit 78, Transcript of Hearing. (Civil Penalty finding ¶ E.23).

24. By the time of the April 17, 2006, hearing before Secretary of State Rokita took place, the national moratorium on (re)certification testing by the appropriate authorities had been lifted, and an independent evaluator accredited under 42 U.S.C. § 15371 (CIBER, Inc.) had completed two of three phases of qualification testing of MicroVote's system's software. (Civil Penalty finding ¶ E.24).

25. A hearing took place before the Indiana Election Commission on April 19, 2006. Evidence was taken at this hearing. *See* Exhibit 80, Transcript of Hearing. (Civil Penalty finding ¶ E.25).

26. The independent testing authority known as CIBER issued a report on April 22, 2006, stating that firmware version 3.07 met the federal testing standards. *See* Exhibit 43, Deposition of James Ries, page 13, lines 23-25; page 14, lines 1-25; page 15, lines 1-25; page 16, lines 1-9. (Civil Penalty finding ¶ E.26).

27. On Saturday April 22, 2006, MicroVote learned that the 3.07 firmware had a problem with the function relating to split precincts. *See* Exhibit 43, Deposition Transcript of James Ries, page 13, lines 23-25; page 14, lines 1-2. MicroVote officials did not inform any Indiana election officials of this problem before the April 28, 2006, certification or the May 2, 2006 primaries. Instead, MicroVote shut down the function completely. *See* Exhibit 43, Deposition Transcript of James Ries, page 13, lines 23-25; page 14, lines 125, page 15, lines 1-25; page 16, lines 1-9. MicroVote did not notify the Indiana Election Commission of the system's deficiency or submit its application for certification of the firmware that corrected this problem until late July 2006. *See* Exhibit 43, Deposition Transcript of James Ries, page 16, lines 4-9. (Civil Penalty finding ¶ E.27).

28. On April 28, 2006, based on the information that was provided to the Commission, the Indiana Election Commission voted to grant certification to MicroVote's electronic voting system, version 3.07 firmware. (Civil Penalty finding ¶ E.28).

29. MicroVote's decision to shut down this function rendered the voting machine incapable of being used in a general election, and thus the firmware was in violation of the Indiana Election Code. *See* Exhibit 43, Deposition Transcript of James Ries, page 13, lines 2325; page 14, lines 1-25; page 15, lines 1-25; page 16, lines 1-9. (Civil Penalty finding ¶ E.29).

30. The split-precinct function was necessary for a general election but was not necessary for a primary election. However, the April 28, 2006, certification granted to MicroVote certified that the machine, at the time of the issuance of the certification, was operational for both the primary and general election. (Civil Penalty finding ¶ E.30).

31. On May 2, 2006, the Indiana primary elections took place, with forty-seven (47) counties using MicroVote equipment with version 3.07 firmware. (Civil Penalty finding ¶ E.31).

32. A second Notice of Violation was issued by the Office of the Secretary of State on August 30, 2006. It covered the alleged violations committed by MicroVote leading up to the May 2006 primary in all of the forty-seven (47) counties in which it does business in Indiana and new issues brought to light leading into the general election. This case was assigned Cause No. 06-0003-ED (hereinafter sometimes referred to as "Cause - 0003"). *See* Notice of Violations, Exhibit 81. (Civil Penalty finding ¶ E.32).

33. MicroVote informed the Indiana Election Commission in a letter dated August 25, 2006 of the software deficiency in its voting system software, stated that it had updated its software to correct this deficiency, and sought to have the updated software approved by the Indiana Election Commission. The Indiana Election Commission imposed a number of conditions for its approval. MicroVote met these conditions; and, accordingly, the Indiana Election Commission approved the updated version of MicroVote's software on October 2, 2006, with a retroactive approval date of September 18, 2006. (Civil Penalty finding ¶ E.33).

34. MicroVote committed at least fifty-seven (57) violations of Indiana Election Law. (Civil Penalty, § C).

35. As of October 1, 2005, MicroVote did not have any electronic voting systems that were certified in the State of Indiana, since its system that was in use up to that point was statutorily decertified on October 1, 2005, and the new system was not completed until March and not certified by the Indiana Election Commission until April 28, 2006. *See* IC § 3-11-7.5-28(a); Findings of Fact ¶ E.28. (Civil Penalty conclusion ¶ C.1.i).

36. Accordingly, MicroVote did not have a product that it could legally market, sell, or lease anywhere in Indiana from October 1, 2005 to April 28, 2006. (Civil Penalty conclusion ¶ C.1.ii).

37. Despite this fact, MicroVote marketed and sold uncertified equipment prior to the May 2006 primary election by (a) signing new sales contracts in ten counties, (b) sending out numerous pricing estimates for purchase of its equipment and (c) emailing counties with quotes and estimates for future purchases. *See generally*, Exhibits 1 through 42 and 83 through 124. (Civil Penalty conclusion ¶ C.1.iii).

38. MicroVote sold, invoiced, and delivered multiple Infinity units that were equipped with firmware that was not certified, all acts which are within the definition of the marketing of its product. *See* Exhibits 1 through 42 and 83 through 124. (Civil Penalty conclusion ¶ C.2).

39. Steve Shamo, salesman for MicroVote in Indiana, confirmed the sales of "new machines" to "Pulaski, Bartholomew, Fayette, Brown, Knox, Shelby, Morgan,

DeKalb, Grant, Hamilton, and Marshall" counties between the dates of "October 1, 2005 and April 28, 2006." Exhibit 125 - Deposition Transcript of Steve Shamo, page 22. (Civil Penalty conclusion ¶ C.3).

40. These sales included somewhere between one hundred (100) and one hundred sixty-five (165) panels. *Id.*, page 23. The admitted sales of uncertified equipment are violations of the Indiana Election Code and subject MicroVote to liability under IC § 3-11-17-2 because uncertified election equipment cannot be sold by a vendor in Indiana. (Civil Penalty conclusion ¶ C.4).

41. MicroVote installed a new updated firmware version in all forty-seven counties with which it does business prior to receiving certification from the Indiana Election Commission. *See*, Exhibit 125 - Deposition Transcript of Steve Shamo, page 12; Exhibit 41- Deposition Transcript of James Ries, pages 7-8. (Civil Penalty conclusion ¶ C.6).

42. Version 3.07 was installed on Infinity equipment prior to its public test date in every county that MicroVote services. *See*, Exhibit 125 - Deposition Transcript of Steve Shamo, pages 13-14. Accordingly, the forty-seven counties performed public tests on uncertified equipment.[3] Although the systems received last-minute certification by the Indiana Election Commission, the systems were uncertified prior to that time. (Civil Penalty conclusion ¶ C.7).

43. Public tests are an integral part of the election process, and therefore part of "an election" even though they are not conducted on Election Day. A public test of a county's voting equipment is statutorily mandated so that the voters are assured that the systems work before voters cast their vote upon it, and it must be completed at least fourteen (14) days prior to the election. *See* IC § 3-11-14.5 *et seq.* The forty-seven counties in which MicroVote does business performed these public tests prior to the May 2006 Primary Election with uncertified equipment which was sold, marked and installed by MicroVote.[4] Therefore, MicroVote "permitted the use of" uncertified equipment in an election by allowing its customers to public test uncertified firmware and software components. (Civil Penalty conclusion ¶ C.8).

44. Another violation of Title 3 occurred prior to the November 2006 General Election. Version 3.07, which had been certified by the Indiana Election Commission prior to the May 2006 Primary Election and installed in all 47 counties serviced by MicroVote, was incapable of allowing for accurate straight-ticket voting which is a necessary prerequisite for any general election. *See*, IC §

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[3] A public test of a county's voting equipment is statutorily mandated. *See* Ind. Codes 3-11-14-5 *et seq.*

[4] *See* The Office of the Secretary of State's Brief in Support of Motion for Summary Judgment, pages 910 and 15-16, referencing designated materials showing public test dates (Exhibits 44 through 77 and 79) and testimony of MicroVote officials that the uncertified equipment had been used in every county for public testing (Exhibits 43 and 125).

3-11-7.5-10 and Exhibit 135 - Deposition Transcript of Steve Shamo, page 15. (Civil Penalty conclusion ¶ C.10).

45. The certification granted to MicroVote on April 28, 2006, certified that the MicroVote machines, at the time of the issuance of the certification, were operational for both the primary and general election. (Civil Penalty conclusion ¶ C.10.i).

46. As early as April 22, 2006, MicroVote knew that version 3.07 was not operational for both the primary and general election, but concealed this fact from the Indiana Election Commission until at least late July or early August, 2006. (Civil Penalty conclusion ¶ C.10.ii).

47. Prior to notifying the Indiana Election Commission of the straight-ticket voting deficiency, via letter on August 25, 2006, MicroVote installed the updated firmware and/or software correcting the straight-ticket voting deficiency on all MicroVote electronic voting systems used in Indiana. (Civil Penalty conclusion ¶ C.10.iii).

48. After receiving MicroVote's August 25, 2006, letter and its application for certification of its new version of firmware/software, the Indiana Election Commission imposed numerous conditions upon the certification of this new firmware/software and on October 2, 2006, after MicroVote had met these conditions, the Indiana Election Commission approved the updated MicroVote's updated version with a retroactive approval date of September 18, 2006. (Civil Penalty conclusion ¶ C.10.iv).

49. In addition, the Commission finds that MicroVote had a full and fair opportunity to litigate these issues in the Civil Penalty Action. *See*, MicroVote's Motion for Summary Judgment at 10.

II. SUMMARY JUDGMENT STANDARD.

1. Summary judgment is appropriate if either party can "show that a genuine issue as to any material fact does not exist and that the moving party is entitled to a judgment as a matter of law." Ind. Code § 4-21.5-3-23(b). Here, the facts established in the Civil Penalty Action, as well as the evidence designated by the Division and MicroVote, show summary judgment is appropriate.[5]

[5] Though not used as the basis for granting this Motion, AOPA provides that, "If a motion for summary judgment is made and supported under this section, an adverse party may not rely upon the

CONCLUSIONS OF LAW

III. THE DOCTRINE OF *RES JUDICATA* DOES NOT BAR THIS ACTION.

1. MicroVote's argument is essentially that because the Division and/or Commission could have intervened in the Civil Penalty Action, and because the Commission and Division are, according to MicroVote, in privity with the Secretary of State's office, this action is foreclosed. MicroVote asserts it should be granted summary judgment because the "issues of law and/or fact were already decided" in the Civil Penalty Action, brought by the Office of the Secretary of State, after the filing of this claim. MicroVote's argument, which is based on *res judicata* and collateral estoppel principles, is that (1) the same parties litigated this action in the Secretary of State Action, or (2) if the parties are deemed different, the Commission is precluded from acting here because it chose not to intervene in the prior action. This issue was previously before the Division and rejected. MicroVote reasserted this issue in its Motion for Summary Judgment, and the Commission again concludes the Division's claims are not barred.

2. For the doctrine of *res judicata* to apply, the following elements must be satisfied: (1) the former judgment must have been rendered by a court of competent jurisdiction; (2) the former judgment must have been rendered on the merits; (3) the matter now in issue was or might have been determined in the former suit; and (4) the controversy adjudicated in the former suit must have been between the parties to the present action or their privies. *Chemco Transport,*

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mere allegations or denials made in the adverse party's pleadings as a response to the motion. The adverse party shall respond to the motion with affidavits or other evidence permitted under this section and set forth specific facts showing that there is a genuine issue in dispute. If the adverse party does not respond as required by this subsection, the administrative law judge may enter summary judgment against the adverse party." Ind. Code § 4-21.5-3-23(f). In response to the Division's Motion for Summary Judgment, MicroVote "incorporated" all of the "pleadings, evidence and testimony" submitted to the ALJ in the Secretary of State Action. This footnote is meant to underscore the obvious: the facts at issue in the Civil Penalty Action matter are established for purposes of this action, and if the Division may bring a this proceeding then MicroVote is liable on the same factual record.

Inc. v. Conn, 527 N.E.2d 179, 181 (Ind. 1988). In addition, and in the context of an administrative proceeding, *res judicata* applies only if (1) the issues sought to be estopped were within the statutory jurisdiction of the agency; (2) the agency was acting in a judicial capacity; (3) both parties had a fair opportunity to litigate the issues; and (4) the decision of the administrative tribunal could be appealed to a judicial tribunal. *Weiss v. Indiana Family & Social Servs. Admin.*, 741 N.E.2d 398, 402 (Ind. Ct. App. 2000). In administrative proceedings, however, the doctrine of *res judicata* "should be qualified or relaxed to whatever extent is desirable for making it a proper and useful tool for administrative justice." *Id.* (citations omitted).

3. At the outset, and though it is unclear exactly how MicroVote asserts the Division and/or Commission procedurally should have been parties to the Civil Penalty action, it appears that MicroVote took no steps to add the Commission or the Division to the Civil Penalty Action before it was finally decided, which was after this action was pending for approximately two months. Until a final judgment was entered in the Civil Penalty Action, it could have no preclusive effect. Restat. 2d of Judgments, § 13; *Martin v. Indiana Bell Tel. Co.*, 415 N.E.2d 759, 761 (Ind. Ct. App. 1981) ("A prerequisite to a plea of *res judicata* is that the prior adjudication must have been a final judgment on the merits"). Thus, this action was not barred at the time it was filed.

4. Nevertheless, and assuming this is a "subsequent" claim even though it was filed before the entry of a final judgment, the actions the Division requests of the Commission could not have been adjudicated in the prior proceeding because the Commission was not a party. The Commission likely could not have been, and in any event was not required to be, a party in the Civil Penalty Action. The prior action involved penalties assessed under Indiana Code 3-11-17-

2. That section provides: "*In addition to any other penalty* imposed, a vendor who knowingly, recklessly, or negligently sells, leases, installs, implements, or permits the use of a voting system in an election conducted in Indiana in violation of this title is subject to a civil penalty under this chapter." (emphasis added). Accordingly, the legislature did not intend this provision to be the sole remedy for a violation of the State's election laws. Moreover, under Indiana Code section 3-11-17-3, only the Secretary of State may assess a civil penalty, and then only after *the Secretary of State* determines a vendor has violated the election laws. Accordingly, the two actions must be distinct, because the legislature has entrusted the Secretary of State and the Commission with different aspects of enforcement, and with different penalties available to each.

5. Indeed, the penalty provision at issue here, Indiana Code section 3-11-7.5-28, provides a different penalty in subsection (f) and is dispositive:

> *If the commission finds* that a vendor has marketed, sold, leased, installed, implemented, or permitted the use of a voting system in Indiana that:
>
> (1) has not been certified by the commission for use in Indiana; or
>
> (2) includes hardware, firmware, or software in a version that has not been approved for use in Indiana;
>
> *the commission* may revoke the approval granted under this section and prohibit the vendor from marketing, leasing, or selling any voting system in Indiana for a specific period not to exceed five (5) years.

Id. (emphasis added).

6. MicroVote asserts that the Commission had an affirmative duty to intervene in the Civil Penalty Action; and, by failing to do so, it is barred from proceeding here. MicroVote asserts this argument based largely on *Burtrum v. Wheeler*, 440 N.E.2d 1147 (Ind. Ct. App. 1982). In that case, the Court of Appeals held that "when a party having an interest in the

subject matter of a lawsuit has notice of a trial thereon and fails to intervene, such party is bound by the *res judicata* effect of the judgment in which it originally declined to participate." *Id.* at 1152. MicroVote also cites *Vernon Fire & Cas. Ins. Co. v. Matney*, 351 N.E.2d 60 (Ind. Ct. App. 1976) and *Westfield Ins. Co. v. Axsom*, 684 N.E.2d 241 (Ind. Ct. App. 1997). None of these cases compels intervention or bars the claim on this record. In the first place, MicroVote's authority stands for the proposition that if a party fails to intervene, it is bound by the issues decided in the first action. Here, the Commission agrees it is bound by the factual determinations in the Civil Penalty Action. To the extent that these authorities are cited for the proposition that a party who fails to intervene is barred from re-litigating factual determinations favorable to it, these cases are distinguishable. First, all of these cases involve a sort of "privity" not at issue here. *Burtrum* involved the wife of a decedent when actions were pending on behalf of both the estate and her individually. The Court in that case simply held that because she had fully participated in the estate action which was decided against her (she was substituted as a party for her deceased husband), she could not then maintain her own. Her daughter's claim was not barred. *Matney* and *Axsom* involve insurance companies—again, a sort of privity not at issue here.

7. The key issue, however, is that by statute the Office of the Secretary of State could not issue the relief the Division seeks the Commission to order, and *vice versa*. Thus, the Commission would have had to intervene not as a party but as the administrative adjudicative body. Nothing in the cases cited by MicroVote could bar this claim because of failure of the Commission to intervene as the governing administrative body, if such an intervention is even possible. Moreover, as noted above, in administrative proceedings the doctrine of *res judicata* "should be qualified or relaxed to whatever extent is desirable for making it a proper and useful

tool for administrative justice." *Weiss*, 741 N.E.2d at 402. It would be unjust to require an administrative body to insert itself in the shoes of another or risk being unable to effect its statutorily mandated jurisdiction.

8. Finally, the Commission is distinct from the Office of the Secretary of State, and thus they are not the same party. MicroVote asserts that because the Division is "an arm" of the Office of the Secretary of State, and is established within its office, it is the same party for purposes of *res judicata*. Ind. Code § 3-6-4.2-1. While the Division may have a close relationship with the Secretary of State's Office, it is not congruous. Most importantly for purposes of this Order, there is little doubt that the Commission is distinct. Ind. Code § 3-6-4.1-1 (establishing election commission); Ind Code § 3-6-4.1-14 (describing powers and duties of Commission, which includes "Administer Indiana election laws."); Ind. Code § 3-11-7.5-28. Finally, the Division is charged with assisting the Secretary of State *and* the Commission. Ind. Code § 3-6-4.2-2. It is in this capacity – assisting the Commission – that the Division requested that the Commission exercise the Commission's authority under Indiana Code section 3-11-7.5-28. Accordingly, for this additional reason, this action is not barred.

IV. MICROVOTE IS PRECLUDED FROM RE-LITIGATING ISSUES ESTABLISHED IN THE CIVIL PENALTY ACTION.

1. The facts giving rise to liability in the Civil Penalty Action are not meaningfully contested. Both sides have included references to that action in their Motions, Responses, and Designation, and both sides have designated significant portions of that proceeding in support of their requested result in this matter. But independent from these designations which serve as an additional basis for this order, there is simply no reason to re-litigate that which was established in that action, and there are sound reasons not to.

2. While "claim preclusion" sometimes operates as a bar to a subsequent action under certain circumstances not applicable here because, *inter alia*, the legislature unequivocally and specifically charged the Commission with different enforcement powers than the Secretary of State, "issue preclusion" – which prevents the re-litigation of facts necessarily litigated in a prior dispute, *Reddick v. Canfield*, 656 N.E.2d 518, 522 n.3 (Ind. Ct. App. 1995) – does apply.

3. MicroVote is correct that *res judicata* principles apply to prevent the re-litigation of facts previously decided. However, because the Commission is the only administrative body empowered by the legislature to revoke approval of an electronic voting system, and is the only administrative body empowered by the legislature to prevent a vendor from marketing, leasing or selling any voting system, the Commission is not barred from taking those steps here. Ind. Code § 3-11-7.5-28(f). Accordingly, the issues previously decided relate to and establish MicroVote's conduct, but do not prevent the Commission from action.[6]

4. Collateral estoppel may be asserted against a defendant or a respondent when, "First, the trial court determines whether the party in the prior action had a full and fair opportunity to litigate the issue. Second, the trial court determines whether it is otherwise unfair to apply collateral estoppel given the facts of the particular case." *Tofany v. NBS Imaging Systems, Inc.*, 616 N.E.2d 1034, 1038 (Ind. 1993). Here, there can be no doubt that there was a full and fair opportunity to litigate the issues in the Civil Penalty Action. MicroVote has not provided any reason why it would be more or less or concerned about violating the same election laws depending on whether the Commission, as opposed to the Secretary of State, would be deciding its penalty.

[6] In the Civil Penalty Action, the Secretary of State rejected MicroVote's defenses. For the reasons noted in that Order, the Commission reached the same conclusions.

5. Additionally, none of the issues normally associated with an unfair application of collateral estoppel are present here. Specifically, where "(a) the defendant had little incentive to vigorously litigate the first action either because the damages were small or nominal, or because future suits were not foreseeable; (b) where the judgment relied upon for estoppel is inconsistent with one or more previous judgments in which the defendant was successful; or (c) where procedural opportunities are available to the defendant in the latter action which were unavailable to him in the previous action and which would likely affect the result," unfairness may result. *Tofany*, 616 N.E.2d at 1038, citing *Parklane Hosiery v. Shore,* 439 U.S. 322 (1979). Here, MicroVote faced a significant monetary penalty in the Civil Penalty Action, had all of the procedural opportunities available to it in that action, and there is no known judgment to which this is inconsistent.

6. "Collateral estoppel promotes judicial economy; in particular, it reduces the amount of . . . time devoted to retrying previously litigated issues." *Tofany* at 1039. Adjudicatory bodies have applied "offensive" collateral estoppel based on prior administrative proceedings. *See Watson Rural Water Co., Inc. v. Indiana Cities Water Corp.*, 540 N.E.2d 131, 137 (Ind. Ct App. 1989); Restat. 2d Judgments, § 83. All of the factors allowing for application of *res judicata* against MicroVote are met here. *See Weiss*, 741 N.E.2d at 402. Accordingly, while the Civil Penalty Action cannot bar the Commission, who was not a proper party and thus did not have the opportunity to litigate the issues in this proceeding, it does prevent MicroVote from re-litigating facts established in that proceeding.

7. Indeed, there are sound reasons not to re-litigate here the facts established in the Civil Penalty Action. Obviously, to re-litigate those issues would not be the most economical way to proceed for any party. Moreover, those facts as established prevent inconsistent orders

and adjudications. Of course, application of the Civil Penalty Action can only be done if MicroVote had a full and fair opportunity to litigate that matter. Here, there is no doubt that it did. Indeed, it admits this is the case. *See* MicroVote's Motion for Summary Judgment at 10.

8. In addition, MicroVote cannot genuinely surprise at the Commission seeking to revoke its approval based, at least in part, on the Civil Penalty Action and the facts and conclusion decided therein. In other words, the existence of that action should not trump the Commission's statutory authority.

9. Moreover, because of the designations of both parties, the Commission has had an opportunity to review the record and findings and conclusions of the ALJ in the Civil Penalty Action and sees no reason to deviate from those findings and conclusions. Accordingly, the following issues were conclusively established in the Civil Penalty Action (with citation to that Order):

(a) MicroVote General Corporation violated the Indiana Election Code, IC § 3-11-7.5-4(d), by marketing its uncertified election equipment in forty-seven (47) counties. *See*, Paragraphs I(E)(7)-(22) & (29) *supra*. (Civil Penalty ¶ G.1).

(b) MicroVote General Corporation violated the Indiana Election Code, IC § 3-11-7.5-4(d), by selling its uncertified equipment in ten (10) counties. *See*, Paragraphs I(E)(7)-(22) & (29) *supra*. (Civil Penalty ¶ G.2).

(c) MicroVote General Corporation violated the Indiana Election Code, IC § 3-11-7.5-4(d), by installing its uncertified equipment in forty-seven (47) counties. *See*, Paragraphs I(E)(7)-(22) & (29) *supra*. (Civil Penalty ¶ G.3).

(d) MicroVote General Corporation violated the Indiana Election Code, IC § 3-11-7.5-4(d), by implementing its uncertified equipment in forty-seven (47) counties. *See*, Paragraphs I(E)(7)(22) & (29) *supra*. (Civil Penalty ¶ G.4).

(e) MicroVote General Corporation violated the Indiana Election Code, IC §§ 3-11-7.5-10, 3-11-7.5-13, 3-11-15-20, 3-11-15-13.1 and 3-11-14-23(d), by installing election systems in forty-seven (47) counties which were inadequate to conduct a general election in Indiana since they would not allow for straight-ticket voting. *See*, Paragraphs I(E)(26)-(32) *supra*. (Civil Penalty ¶ G.4).

10. Accordingly, MicroVote is found to have sold, marketed, installed and permitted use of uncertified voting equipment in violation of Indiana Code section 3-11-7.5-28.

JUDGMENT

In the Civil Penalty Action, it was conclusively established that MicroVote, during the Uncertified Period, (1) sold uncertified voting system, (2) marketed uncertified voting system, (3) installed uncertified voting system, and (4) permitted the use of uncertified voting system. The Commission, having the same evidence before it as well as the final Order in the Civil Penalty Action, adopts the conclusions from that Action. Each of these violations individually may result in the revocation of MicroVote's approval for five years.

After consideration of the parties' Motions and the authorities cited therein, and for the reasons set forth in this Order, MicroVote's Motion for Summary Judgment is **Denied**, and the Indiana Election Division's Motion for Summary Judgment is **Granted**. The Division requests a five (5) year decertification and injunction. After considering the violations at issue and established in the Civil Penalty Action, and the defenses raised by MicroVote in both actions, the Indiana Election Commission revokes MicroVote's approval of its electronic voting system and prohibits MicroVote from marketing, leasing or selling any voting system in Indiana for five (5) years, subject to the provisions in Ind. Code § 3-11-7.5-28(g), the specific dates of which shall be determined by the Commission.

The final authority in this matter is the Indiana Election Commission, and the Administrative Orders and Procedures Act grants both parties the ability to object to this Order issued by the ALJ by filing an objection with the final authority. "To preserve an objection to an order of an administrative law judge for judicial review, a party must not be in default under this chapter and must object to the order in a writing that (a) identifies the basis of the objection with reasonable particularity; and (b) is filed with the ultimate authority responsible for reviewing the order within fifteen (15) days (or any longer period set by statute) after the order is served on the petitioner." Ind. Code § 4-21.5-3-29.

DATED: March 31, 2008

Paul L. Jefferson
Administrative Law Judge

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